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CHAPTER 4

PROCUREMENT STANDARDS

OVERVIEW

Grantees may use their own procurement procedures that reflect relevant state and local laws so long as the procurement meets, at a minimum, applicable Federal laws and standards. This chapter provides guidance to Grantees regarding the federal and state requirements applicable to the HOME program that govern the procurement of property and services.

This chapter includes four sections:

- I. General Procurement Requirements
- II. Procurement of Professional Services
- III. Procurement by Small Purchase Procedures
- IV. Construction Bidding

Situations where local governments must follow State standards that are more restrictive than federal standards are noted throughout this chapter.

Grantees that are CHDOs are encouraged to follow the procurement guidelines described in Sections II and III of this chapter. If a CHDO grantee does not plan to issue a Request for Proposals prior to contracting for professional services or does not plan to follow the small purchase procurement procedures prior to purchasing goods, the CHDO shall submit a written explanation to the HOME program that includes the reasons for choosing a noncompetitive method of procurement.

Note: CHDOs must follow the requirements detailed in Section IV, Construction Bidding. During the construction bidding process, CHDOs should reference and follow the guidance provided in **Section I, General Procurement Requirements**.

While CHDOs have greater flexibility regarding procurement requirements, they must follow the same *contracting* requirements as local governments, including:

- Conducting a debarment check prior to awarding a contract;
- Including the appropriate HOME supplemental conditions in all contracts, and
- Ensuring that all contracts are fixed-price rather than cost plus.

I. GENERAL PROCUREMENT REQUIREMENTS

A. MISCELLANEOUS PROCUREMENT STANDARDS

Procurement procedures must reflect, at a minimum, the procurement standards listed in **Exhibit 4-A**. If a Grantee's existing procurement procedures do not reflect the procurement standards listed, the Grantee's official representative must sign **Exhibit 4-A**, place a signed copy in its Management Plan and forward a copy to its HOME Program Officer.

B. CONFLICT OF INTEREST PROVISIONS

A written code of standards governing performance of the Grantee's employees engaged in the award and administration of contracts must be maintained. At a minimum, these standards must:

- Require that no employee, officer or agent of the Grantee participate in the selection, award or administration of a contract supported by HOME if a conflict of interest, real or apparent, exists. Such conflict would arise when any of the following parties has a financial or other interest in the firm selected for award:
 - Employee, agent or officer of the Grantee;
 - Any member of the above's immediate family;
 - A partner of the above; or
 - An organization that employs or is about to employ any of the above.
- Require that the employees, agents and officers of the Grantee not solicit or accept gratuities, favors or anything of monetary value from contractors, potential contractors or parties to subagreements. However, the Grantee may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value; and
- Stipulate provisions for penalties, sanctions or other disciplinary actions for violations of such standards to the extent permitted by State or local law.

Note: Title 2, Chapter 2, Part 1, MCA, *Code of Ethics*, establishes a code of ethics for all officers and employees of state and local governments.

C. CONTRACTING WITH SMALL, MINORITY, AND WOMEN'S BUSINESS ENTERPRISES

Affirmative steps must be taken by HOME Grantees to assure that small, minority-owned and women-owned business enterprises are used when possible as sources of supplies, equipment, construction and professional and other services. **Chapter 5, Civil Rights**, gives further discussion on the civil rights requirements associated with HOME grants. Affirmative steps include the following:

1. Placing qualified small, minority-owned and women-owned business enterprises on solicitation lists.
2. Assuring that small, minority-owned and women-owned business enterprises are solicited whenever they are potential sources. The Disadvantaged Business Enterprise (DBE) Directory maintained by the Montana Department of Transportation can be accessed at the following internet link:

http://www3.mdt.mt.gov:7782/mttplc/mttplc.tplk0002.contractor_init

When economically feasible (and where consistent with Montana law), divide total requirements into smaller tasks or quantities to permit maximum participation by small, minority-owned and women-owned business enterprises.

3. Accessing the online version of American Business Directory from Reference USA, which the **Montana State Library** has licensed for use by anyone on the State's network. This is a directory of 12 million American businesses, which can be searched by name, type, geographic region and many other variables. Information includes numbers of employees, estimated sales, credit rating, chief executive officers, etc. It should be helpful to economic development research and marketing activities. The web site address is:

<http://reference.infousa.com>

4. Establishing delivery schedules that encourage participation by small, minority-owned and women-owned business enterprises.
5. Utilizing the services and assistance of the U.S. Small Business Administration and the Minority Business Development Agency of the U.S. Department of Commerce.
6. Requiring the prime contractor to take the affirmative steps outlined in paragraphs 1 through 5 above if subcontracts are to be used.

D. GEOGRAPHIC PREFERENCE

Grantees **cannot apply statutorily or administratively imposed in-state or local geographical preferences** in the evaluation of bids or proposals. However, when contracting for architectural and engineering services, geographic location may be a selection criterion so long as an appropriate number of qualified firms, given the nature and size of the project, exist within the geographic area. Including in a *Request for Proposal* such criteria as "knowledge of the community" or "experience with the community" would restrict the competition and be unacceptable.

In all cases, Montana state licensing laws must be followed.

E. ECONOMIC OPPORTUNITIES FOR LOW AND VERY LOW-INCOME PERSONS

Section 3 of the *Housing and Urban Development Act* of 1968, as amended (12 U.S.C. 1701u) requires, to the extent feasible, that Grantees ensure economic opportunities for low and very-low income persons residing in the targeted geographical areas where HUD assistance takes place. Hiring low- and very-low income persons to work on the projects funded with HOME funds implements this provision, and gives local businesses a preference in the solicitation of services and construction work needed to complete HOME assisted projects.

When drawing HOME funds to reimburse contractor expenses, Grantees need to report Section 3 activities on **Exhibit 3-H**.

F. GOODS AND SERVICES PAID FOR WITH NON-FEDERAL FUNDS

Regardless of the source of funds used to pay for goods or services in a federally funded project, federal requirements apply unless state or local laws are more restrictive.

G. DEBARMENT CHECKS

Before awarding a contract, **ALL GRANTEES** must conduct a debarment check on the proposed contractor. Grantees have two options for conducting a debarment check.

1. *Prior to awarding a contract*, the Grantee can provide its HOME Program Officer with the name of the prospective contractor firm and its principal owners. HOME staff will check the U.S. General Services Administration's "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" to determine if those contractors or owners are listed and will then notify the Grantee of the contractor's eligibility or ineligibility. This process typically takes a few days.
2. *Prior to awarding a contract*, the Grantee can choose to conduct its own debarment check via the Internet:

<http://epls.arnet.gov/epl/servlet/EPLSearchMain/1>

Instructions for accessing this information are provided as **Exhibit 4-B**. Grantees should search BOTH the firm name and the contractor's proper name. Grantees must send signed copies of the finding results to their HOME Program Officer.

HOME staff will not process *Requests for Reimbursement* for contractors for whom a debarment check cannot be documented.

H. REQUIRED CONTRACT PROVISIONS

Contracts must be either a fixed-price or cost-reimbursement type contract. **"Cost plus a percentage of cost" and "percentage of construction cost" methods of contracting cannot be used under any federally funded contract.**

Certain conditions must be included in every contract. For professional services, the Grantee may use the sample contract (**Exhibit 4-C1**) that already includes all required conditions. If a Grantee uses its own contract format, the required HOME contract clauses and conditions (**Exhibits 4-C2 and 4-C3**) must be included either as a supplement to the contract or within the contract itself. Because of its complexity, a sample construction contract is not provided. Construction contracts are discussed in greater detail in this chapter's **Section IV, Construction Bidding**.

Exhibit 4-C4 is a checklist Grantees may use to ensure all federally required clauses/conditions are included in project contracts.

I. RECORD KEEPING REQUIREMENTS

Grantees are required to maintain records regarding procurement. These records should provide an understandable history of the procurement including the following: the procurement document (e.g., the invitation for bids, request for proposals), contractor responses, the basis for selection or rejection of the contractor, basis for the contract price, debarment check and contract specifications/scope of work and conditions.

The Grantee must document that reasonable efforts to conduct procurement transactions occurred in a full and open manner that did not have the effect of restricting or eliminating competition.

J. NONCOMPETITIVE NEGOTIATION

Noncompetitive negotiation or sole source procurement is procurement through solicitation of a proposal from only one source or, when after solicitation of a number of sources, it is determined that the competition is inadequate. **Procurement by noncompetitive proposals may be used only under rare circumstances.** Grantees that feel they have circumstances warranting the use of non-competitive procedures should contact their HOME Program Officer. **In all cases, noncompetitive negotiations must receive prior approval from MDOC.**

K. PUBLIC NOTICE REQUIREMENTS-LOCAL GOVERNMENTS ONLY

When evaluating proposals, local governments may be subject to the Montana open meeting laws, requiring public notice of evaluation committee meetings. MDOC does not believe these requirements apply to procurement of goods and services associated with HOME projects; however, local government Grantees are encouraged to consult their legal counsel for guidance.

II. PROCUREMENT OF SERVICES

A. PRIOR COMMITMENTS TO CONSULTANTS

A HOME Grantee may have contracted with a consultant or architect/engineer to prepare the original HOME application or project design. This contract cannot be renewed or extended without further competition unless it can be clearly documented that the original hiring met all federal and state requirements and included a scope of services that could extend beyond grant writing at the Grantee's discretion. Professional services provided for a longer period than originally procured must be re-advertised. The original consultant may respond to the Grantee's RFP, and it is perfectly legitimate to consider that consultant's prior performance when making the selection.

A community may receive a proposal for what is called a "loss leader" arrangement, where the consultant offers to prepare or assist with a grant application at cut rates or for no cost, in return for favorable consideration in the selection process for a project manager or architect/engineer. No such arrangement, whether based on an oral or written agreement, can be valid or binding on the Grantee since it clearly violates federal requirements mandating "full and open competition."

B. GRANT ADMINISTRATION/CONSULTING SERVICES

In 1998, MDOC adopted a policy that grant administration services (consulting services) for HOME grants be procured using the following procedures:

- Requests for Proposals (RFPs) are required for any services over \$100,000 and are recommended for procurements under \$100,000 that are complex and/or where qualifications and desired work products cannot easily be handled by telephone rate quotations. **HUD Notice CPD-96-05** provides additional guidelines on the use of RFPs for HUD funded projects. The Notice may be requested from MDOC or viewed at the following link:

<http://www.hud.gov/offices/cpd/lawsregs/notices/1996/96-5.pdf>

- HUD "small purchase" procedures can be used where the procurement will not cost more than \$100,000 in the aggregate, and where the procurement is relatively simple and a selection decision can be made based on three to five rate and work plan quotations from qualified sources. The Grantee should record the rate or quote along with other identifying information (name, address, and phone) and document the questions asked. If the selection is made using small purchase procedures, the Grantee also should contact the Montana Department of Transportation (MDOT) to obtain a list of Minority Business Enterprises/ Disadvantaged Business Enterprises (MBE/DBE) certified firms within the region that appear in MDOT's directory in order to invite proposals from qualified MBE/DBE firms.

- If a local government's procurement policy is more restrictive than MDOC procedures, the local government's policy will govern the procurement procedures to be followed.
- Based upon additional guidance from HUD, MDOC procurement requirements would not apply to the formation of long-term partnerships between a local government and a for-profit or non-profit partner when the partnership has a current legal relationship (signed contract), the partner is managing the grant funds, the local government does not have the staffing capability to manage the grant, and the relationship will continue indefinitely following project closeout.

A "long-term relationship" exists where services to be provided are an integral component of the project or activity and are essential to or necessary for the long-term operation of the project/program after closeout. This long-term relationship must have been clearly documented in the proposed management plan submitted as part of the grant application. The key principle is that the for-profit or non-profit entity must have a pre-established, long-term integral role in the continued operation or management of the facility or activity after project closeout. The non-profit or for-profit must be accountable to the recipient of the grant for the use of funds provided.

A "partnership" is viewed by the state as a long-term, mutually beneficial relationship as determined by the local government. The partnership agreement *must be in place before submission of the grant application* to MDOC. A partnership would include relationships that will continue indefinitely following formal project closeout.

The following is a step-by-step process that may be used to procure consulting services in a manner that is fully and openly competitive. This procedure helps ensure that awards are made to the responsible firm whose proposal is most advantageous to the program, with factors such as qualifications, experience, availability and price considered.

1. Prepare a Request for Proposal (RFP)

An RFP is an invitation for consultants to compete for the provision of services. A sample RFP for management services is provided in **Exhibit 4-D1** and includes required information for a general RFP. The Grantee's RFP should be adapted to reflect the unique activities and considerations involved in the specific HOME project.

- The RFP must include a clear and accurate statement of work that details required services. **The statement must not contain features that unduly restrict competition.**
- The RFP must clearly and accurately state selection criteria and relative importance against which all proposals are evaluated. **Price shall be included as one of the selection criteria.**

2. Request HOME Review

- Provide copies of the following documents to the assigned HOME Program Officer for review and approval at least two weeks prior to advertising:
 - a. Copy of the RFP;
 - b. Copies of the selection criteria, evaluation forms and scoring matrix used to compare responses (see **Exhibit 4-D2** for samples);
 - c. Copy of the proposed contract that includes all required conditions (see **Section I (H), Required Contract Provisions** of this chapter);
 - d. Copy of the advertisement used to publicize the RFP (**Exhibit 4-D3**).

3. Solicit Proposals

- Proposals must be solicited from an adequate number of qualified sources.
- Advertise the RFP at least once in the newspaper used for regular legal advertising and once in a newspaper with regional distribution in the state.
- Prepare a direct mailing to qualified individuals on the Disadvantaged Business Enterprise (DBE) Directory maintained by the Montana Department of Transportation. (See **Section I (C), Contracting with Small, Minority and Women's Business Enterprises** of this chapter.)

4. Conduct Evaluations

- Evaluate RFPs using the pre-approved selection criteria. Contact several references for the candidate(s) being considered and interview the most qualified candidate(s). Determine the proposal that is most advantageous to the program.

5. Request Debarment Check

- Debarment checks are discussed in detail within **Section I (G), Debarment Checks**.

6. Award a Contract

- The contract must be either a fixed-price or cost-reimbursement type contract. **"Cost plus a percentage of cost" and "percentage of construction cost" methods of contracting cannot be used under any federally funded project.**

C. ARCHITECTURAL, ENGINEERING AND LAND SURVEYING SERVICES

Montana Law (Sections 18-8-201 through 212, MCA) directly addresses procurement of architectural, engineering or surveying services. If fees for these services are estimated not to exceed \$20,000, local governments may contract for the services by direct negotiation. However, if the amount estimated for architectural, engineering or surveying services

exceeds \$20,000, competitive, advertised bidding is required. Competitive proposals are evaluated based on qualifications. The most qualified competitor is selected, subject to negotiation of fair and reasonable compensation.

Following is a step-by-step process to procure architectural and/or engineering (A/E) services in a manner that is fully and openly competitive based on qualifications. This procedure helps ensure that awards are made to the responsible firm whose proposal is most advantageous to the program.

1. Prepare a Request for Proposal (RFP)

An RFP is an invitation for architects and engineers to compete for the provision of services. A sample RFP for architectural and engineering services is provided in **Exhibit 4-D4** and includes required information for a general RFP. The Grantee's RFP should be adapted to reflect the unique activities and considerations involved in the specific HOME project.

- The RFP must include a clear and accurate statement of work that details required services. **The statement must not contain features that restrict competition.**
- The RFP must clearly and accurately state selection criteria (i.e., qualifications, experience, and availability) and relative importance against which all proposals are evaluated. **Note: Price is not an initial factor in the architectural, engineering or land surveying selection process. However, the Grantee may indicate the amount budgeted for the architectural or engineering portion of the project.**

2. Request HOME Review

- Provide copies of the following documents to the appropriate HOME Program Officer for review and approval at least two weeks prior to advertising.
 - a. Copy of the RFP.
 - b. Copies of the selection criteria, evaluation forms and scoring matrix used to compare responses. (See **Exhibit 4-D2** for samples.)
 - c. Copy of the proposed contract that includes all required conditions. (See **Section I (H), Required Contract Provisions.**)
 - d. Copy of the advertisement used to publicize the RFP (See **Exhibit 4-D3**).

3. Solicit Proposals

- Proposals must be solicited from an adequate number of qualified sources.
- Advertise the RFP at least once in the newspaper used for regular legal advertising and once in a newspaper with regional distribution in the state.
- Prepare a direct mailing to qualified individuals on the Disadvantaged Business Enterprise (DBE) Directory maintained by the Civil Rights Bureau of the Montana Department of Transportation. (See **Section I (C)**, Contracting with Small, Minority and Women's Business Enterprises.)

4. Conduct Evaluations

- Evaluate RFPs following the pre-approved selection criteria and determine the most qualified candidate(s) for the project. Contact several references for the candidate(s) being considered and interview the most qualified candidate(s).
- Determine the most qualified respondent and negotiate terms for compensation of services at a "fair and reasonable cost."
- If the Grantee and the selected candidate cannot come to an agreement on the scope of services and mutually satisfactory fee, negotiations should be formally terminated in writing and new negotiations entered into with the second-ranked respondent.

5. Request Debarment Check

- Debarment checks are discussed in detail under **Section I (G) Debarment Checks** of this chapter.

6. Award a Contract

- The contract must be either a fixed-price or cost-reimbursement type contract. **"Cost plus a percentage of cost" and "percentage of construction cost" methods of contracting cannot be used under any federally funded project.**

III. PROCUREMENT BY SMALL PURCHASE PROCEDURE

HUD "small purchase" procedures should be used where the procurement of a property or service will not cost more than \$100,000 in the aggregate, and where the procurement is relatively simple and a selection decision can be made based on three to five rate and work plan quotations from qualified sources.

State law related to counties and municipalities is more restrictive. County and city and/or town Grantees should reference 7-5-2301 and 7-5-2304, MCA and 7-5-4302

through 7-5-4303, MCA, respectively, for guidance regarding the use of competitive, nonadvertised bidding for certain purchases. The current law sets the threshold for competitive, nonadvertised bidding at \$50,000 for counties, cities and towns depending on the item purchased.

When “small purchase” procurement procedures are used, the Grantee should record the rate or quote along with other identifying information (name, address, and phone) and document the questions asked. The Grantee also should contact the Montana Department of Transportation (MDOT) to obtain a list of Minority Business Enterprises/Disadvantaged Business Enterprises (MBE/DBE) certified firms within the region that appear in MDOT’s directory in order to invite proposals from qualified MBE/DBE firms. The list may be accessed on the MDOT website at:

http://www3.mdt.mt.gov:7782/mttplc/mttplc.tplk0002.contractor_init

Oral/phone quotes are usually considered appropriate only for very small purchases, such as a filing cabinet. MDOC suggests HOME Grantees get at least three *written* price quotations for any item to be procured under “small purchase” procedures.

Note: Grantees cannot specify a “brand name” product without specifying that “an equal or better product” can be offered and describing the performance specifications of the requested product.

IV. CONSTRUCTION BIDDING & CONTRACTING

When a single contract for a construction activity (including substantial rehabilitation) is expected to exceed \$100,000, all Grantees must procure services by sealed bids. The sealed bid requirements are described in this section.

The Construction Bidding and Contracting process can be complex. Throughout this section, several references will be made to guidance provided in earlier sections of this Chapter. Some areas (e.g., “Labor Standards”) may not apply to a Grantee’s particular project. When in doubt, please contact your HOME Program Officer.

The Grantee must maintain thorough records of the entire construction process from bidding through the final notice of completion. This includes keeping copies of all documentation in appropriate HOME files which will be reviewed during the HOME Program monitoring.

A. GRANTEE RESPONSIBILITIES - A Step-by-Step Guide to Implementation

1. Select Engineering and/or Architectural Service Firm

The Grantee should follow the instructions in **Section II C, Architectural, Engineering and Land Surveying Services** for selecting an engineer or architect to prepare the final project plans, including drawings and material specifications.

The architect/engineer should be provided with this section (**Section IV, Construction Bidding and Contracting**) of the HOME manual early in the plan development process. It is not necessary to send a set of the project blueprints to us for review. Specifically, ensure that your architect/engineer is aware of the following HOME requirements:

- The architect or engineer must certify the design takes into account the applicable accessibility requirements under Section 504 of the Rehabilitation Act of 1973, the Fair Housing Act and the Americans with Disabilities Act (ADA). The architect's certification (**Exhibit 4-E**) must be co-signed by a local official and included as part of the bid package.
 - Section 504 must be applied when a multi-family housing project consists of five or more HOME-assisted units. Under Section 504, at least five percent of the units (or a minimum of one unit) must be accessible to persons with mobility impairments and at least an additional two percent of the units (or a minimum of one unit) must be accessible to persons with hearing or vision impairments.
 - The Fair Housing accessibility requirements must be applied when a HOME-assisted, multifamily housing project involves construction of four or more attached units. The Fair Housing design and construction requirements for buildings can be found in the Department of Labor & Industry, Employment Relations Division, Human Rights Bureau brochure entitled *Fair Housing Is Your Right* and in **Chapter 5, Section II** of this HOME Administration Manual. Fair Housing requirements may also be found on the Montana Department of Labor and Industry website at:

<http://erd.dli.mt.gov/humanright/housediscrim.asp>
 - ADA housing accessibility requirements apply to housing owned by state and local government entities. ADA accessibility requirements may apply to apartment rental offices and public areas regardless of project ownership.
- Federal and state requirements govern wages and working conditions for laborers and mechanics employed under certain construction contracts funded in whole or in part with HOME funds. Specifically, projects involving rehabilitation or new construction contracts for 12 or more HOME-assisted units trigger federal Davis-Bacon wage rate requirements.

Part C, Labor Standards, of this Section discusses the steps required to successfully comply with Davis-Bacon labor standards.

- Under no circumstances can the Grantee change the bid specification package and negotiate with the low bidder to bring the offer in line with the project budget.
- Your HOME Program Officer must review and approve the bid package prior to publishing the invitation for bids. Allow at least two weeks for your HOME Program Officer to review this information.

- Structures modified or constructed with HOME funds must meet or exceed local codes, or in the absence of local codes, the current requirements contained within at least one of the following:
 - Uniform Building Code (ICBO);
 - National Building Code (BOCA);
 - Council of American Building Officials (CABOE) one or two family code.

Newly constructed housing must meet the current edition of the Model Energy Code.

- Grantees cannot specify in bid documents a “brand name” product without specifying that “an equal or better product” can be substituted.

2. Prepare Bid Package

When preparing the bid package, the following activities should be completed:

- Develop a set of plans and specifications for the construction project, including an accurate and clear description of the technical requirements of the project. An architect or engineer registered or licensed by the State of Montana must stamp the plans and drawings prepared for the HOME project.
- Acquire any property, easements, or rights-of-way that might be required for construction of the facility (see **Chapter 6, ACQUISITION**).
- Obtain information from local public utilities offices regarding underground installations. Utility locations should be identified on a map of the project site to be included in the bid package. The contractor should verify these locations prior to actual construction and be held liable for any subsequent damages to underground facilities.
- Determine and specify the cost and pricing format. Contracts may be either lump sum or unit priced. **Cost plus contracts are not allowed.**
- Prepare the **bid package** to include at least the following items:
 - ✓ Invitation for bids (see sample form, **Exhibit 4-F1**) and advertisement for bids (see sample form, **Exhibit 4-F2**).
 - ✓ Information on the method of bidding, process by which the bids will be evaluated, and the method of contract award.
 - ✓ Bid schedule.
 - ✓ Bid bond requirements.
 - ✓ Information on performance and payment bond requirements.

- ✓ A copy of the current wage rate determinations, as provided and/or approved by the HOME Program Officer, in any solicitation for bids for construction or rehabilitation of 12 or more units.
- ✓ General contract conditions.
- ✓ Supplemental general conditions. All HOME-assisted construction contracts entered into by Grantees must contain the applicable clauses and conditions found in Exhibits 4-C2 and 4-C3. If the General Contractor has sub-contractors, both the General Contractor and the sub-contractors must comply with all required supplemental conditions.

The Montana Contractors' Association publishes model bid specifications entitled *Montana Public Works Standard Specifications* (Fifth Edition, March, 2003), which include the items listed above. Copies can be ordered from the Montana Contractors' Association, 1717 11th Avenue, Helena, Montana 59601, phone (406) 442-4162 (Single Copy \$50.00).

Note: If a Grantee is acting as the General Contractor for the project, they are to advertise for bids on all sub-contracts thereby promoting "free and open competition."

3. Obtain Bid Document Review and Approval

Once the complete bid package has been assembled, the Grantee's attorney should review it for completeness and consistency with state and federal laws and regulations.

The complete bid document must also be sent to your HOME Program Officer for HOME approval prior to letting the contract out for bid. **Allow 15 working days for HOME to review and approve the bid package. Exhibit 4-G, *Transmittal of Contract and Proposed Bid Document*** letter, is provided for your reference but is not required.

It is the Grantee's responsibility to ensure that the bid package receives the review and approval, in writing, of all other applicable state or federal agencies. For example, prior to issuing a building permit, cities typically will review and approve the proposed plans. The time needed for this review process should be taken into consideration when developing the project implementation schedule.

4. Advertise Bid Solicitation

Exhibit 4-F2, *Advertisement for Bids*, may be customized and placed in local and regional publications. **Municipalities** should reference 7-5-4302, of the *Montana Code Annotated* (MCA) for specific competitive bid advertising requirements. Similarly, **counties** are provided guidance on competitive advertising for bids in 7-5-2301 and 7-5-2304 of the *Montana Code Annotated* (MCA). The following table summarizes the bid advertising requirements for counties and municipalities as specified in the above sections of the *Montana Code Annotated* (MCA). **CHDOs** should advertise a minimum of one time in a regional publication.

Minority Business Enterprise and Women's Business Enterprise (MBE/WBE) requirements are applicable to HOME funded construction contracts. The procedures for compliance are discussed in this chapter **Section I C, Contracting with Small, Minority and Women's Business Enterprises**, and **Chapter 5, Civil Rights**.

Note: Any amendments to the bid package must be mailed, as an addendum, to each bidder. Every bidder must be given an appropriate period of time to review and respond to the amendments.

Competitive Bid Advertising Requirements, per *Montana Code Annotated (MCA)*:

| | <u>MUNICIPALITIES</u> | <u>COUNTIES</u> |
|---------------------------------|--|------------------|
| <i>Qualification</i> | ▪ For contracts \$50,000 or more | ▪ Same |
| <i>Advertising Requirements</i> | ▪ Published at least twice in a newspaper of regular circulation (i.e. weekly or daily). Six days must separate each publication | ▪ Same |
| <i>Duration of Bid Review</i> | ▪ Bid opening must be made not less than 5 days or greater than 12 days after second publication. | ▪ No requirement |

5. Log Each Bid

Each bid should be logged as to time and date of receipt. The bids should remain sealed and safely stored until the official bid opening.

6. Conduct Bid Opening

The bid opening should be conducted in a businesslike manner, with each bid being opened and reviewed **prior** to reading aloud the dollar amounts. If any irregularities are found, the amounts should not be read or considered, and the bid should be returned to the bidder. Should an error in the bids be identified, the Grantee's attorney should review the state statutes governing bid irregularities before proceeding further. When all matters of bid irregularities are resolved, the low bidder then will be identified.

The Grantee should document and file the bid opening activities.

Examples of irregularities that can be considered grounds for the rejection of a bid include:

- ✓ Bid proposals not submitted on specified forms.
- ✓ Unsigned bid proposals.
- ✓ Bid proposals not accompanied by the specified guarantee (bid bond, etc.).
- ✓ Bid proposals by unqualified or improperly licensed entities.
- ✓ Qualifying a bid or bid items in a bid proposal in a manner contrary to the specified bid items or specifications of the bidding documents.

- ✓ Bid proposals which omit items required in the specifications.
- ✓ Altering a bid as to specified time of commencement or completion of work.
- ✓ Bid proposals that fail to acknowledge an addendum.

Examples of *minor bid irregularities* that may be waived include:

- ✓ Omission of the date when signed, or omission of the title of person signing.
- ✓ Failure to initial erasures (assuming other information is legible).
- ✓ Failure to acknowledge an addendum which does not affect the quantity, quality, timing, or price of goods or services.
- ✓ Submission of a bid in an unsealed envelope.
- ✓ Omission of a subcontractor or supplier's name at the time bid is submitted.
- ✓ Unit price bid proposals that include correctable, reconcilable arithmetic errors if the unit price does not change.
- ✓ Lump sum bid proposals that include correctable, reconcilable arithmetic errors if the amount on which the award will be based does not change.

Note: *The Montana contractor bid preference does not apply to construction contracts funded with federal HOME funds.*

Bids Exceeding Funds Available:

In the event that all bids exceed the amount of funds available for the construction project, the Grantee has two options:

1. Use additional local financing resources such as general revenues or bond proceeds, or
2. Modify the bid package and repeat the entire bid process outlined above.

Under no circumstances can the Grantee change the bid specification package and negotiate with the low bidder to bring the offer in line with the project budget.

If a Grantee has reason to believe that bids may come in higher than available funds, project alternates may be used. Under this approach, the bid proposal would contain alternates of work items or components to be provided. This allows the Grantee flexibility to accept alternates in any order or combination and to determine the low bidder on the basis of the sum of the base bid and alternates accepted.

When all bids received are less than the approved budget for the construction project, HOME and all funding sources will share proportionately in any savings. Should a balance of budget funds remain which the Grantee wishes to use for additional or lower priority construction activities, the Grantee should immediately send the HOME Program Officer a written request, including full rationale and cost details. If HOME reviews and approves this request, the Department will amend the grant contract for the additional activities. Should this request be denied by HOME, the amount of the low bid plus ten percent (10%) contingency will be allowed as the revised or final construction budget.

7. Review Low Bid

Following the bid opening, the low bid should be reviewed to ensure the bid submission was technically and legally responsive to the solicitation for bids; and the contractors and all subcontractors are qualified and have the capacity to carry out the project as scheduled. If, in the opinion of the project architect or engineer and the Grantee's attorney, the low bid proves to be unsatisfactory and the Grantee chooses to use the next lowest bidder, a statement of justification must be sent to the low bidder. A copy of this justification must be kept on file in the HOME procurement file.

All contractors are required to register with the Department of Labor and Industry (406-444-7734). Contractor registration provides proof of compliance with worker's compensation and unemployment insurance in the event an individual is injured while working on a project. Independent contractors have the option of applying for an ***Independent Contractor Exemption***. An exemption is only issued to contractors who are self-employed and have no other employees. For information on this exemption, you can contact the Independent Contractor Exemption division of the Montana Department of Labor and Industry (406-444-1446).

Within 15 days after bids are received on all project activities, a final project budget should be finalized between the Grantee and the selected Contractor.

8. Debarment Check of Low Bidder

Prior to awarding the contract, a debarment check must be completed. Reference **Section I G, Debarment Check**, for information regarding debarment checks. After the debarment review, no further HOME approval is required for the contractor. Keep a copy of the debarment check with other procurement documentation in your HOME project files, and ensure the HOME Program Officer also has a copy of debarment documentation.

9. Award the Contract

Within 30 days of the bid opening, the Grantee should make the contract award unless there are special circumstances necessitating a delay in the bid award (e.g., if the funds are not yet available, or if the project requires some legislative action). If a delay of longer than 30 days is anticipated, Grantees should contact their HOME Program Officer for guidance.

The complete contract package should consist of an executed contract document that includes the following attachments:

- ✓ All items included in the bid package,
- ✓ The contractor's bid proposal,
- ✓ Bond and insurance forms,
- ✓ Signed contractor certifications and special provisions.

The Grantee should send to the assigned HOME Program Officer a *Notice of Contract Award and Preconstruction Conference*, including the date on which construction will start (see **Exhibit 4-H**).

10. Hold Preconstruction Conference (required for projects where Davis-Bacon regulations apply; recommended for all projects)

The preconstruction conference should be held soon after the contract is awarded. The Grantee and prime contractor should include all subcontractors in the discussions in order to ensure the subcontractors are aware that they also must comply with federal labor standards (if applicable) and civil rights provisions.

The preconstruction conference represents a key opportunity for the Grantee to give instructions to the contractor and sub-contractors prior to beginning project construction. Refer to **Part C, Labor Standards**, of this chapter for additional information on preconstruction conferences. Minutes of the preconstruction conference should be made available to HOME staff for review.

11. Issue Notice to Proceed

After executing the contract and holding the preconstruction conference, the Grantee may issue the prime contractor a *Notice to Proceed*. This notice establishes the construction starting date and the estimated date of completion.

In the event a contractor is unable to complete a construction project, the Grantee may assess the contractor for the costs the Grantee must incur in order to complete the project. This assessment generally takes into account the work actually performed by the original contractor and the total amount of any contracts needed to satisfactorily complete the construction. These provisions must be consistent with the corresponding elements of the contract document.

12. Monitor Contractor Activities

Throughout the construction period, the Grantee is responsible for monitoring the contractor for performance with the project's technical specifications, compliance with all federal, state, and local standards, and the terms of the contract.

Permits must be obtained from the Montana Department of Labor & Industry Building Codes Bureau (MDOLI) for all electrical and/or plumbing work undertaken with HOME funds, unless the Grantee has been certified by the MDOLI Bureau to enforce the applicable building codes. In such cases, permits will be obtained locally. In addition, in those cases where the MDOLI Building Codes Bureau has not certified the Grantee, permits must be obtained from the MDOLI Bureau for general building and mechanical work involving any commercial or public buildings (Contact MDOLI at 406-841-2300).

The Grantee's architect or engineer should conduct performance monitoring and it should consist of the following elements:

- General supervision, including identifying the need for any construction adjustments and preparation of contract amendments. **Change orders that affect the approved scope of work, as described in the HOME contract with the Grantee, the contract budget, or the estimated construction schedule, require prior HOME review and approval before such change orders are signed.**
- Quality control to the extent necessary to ensure compliance with technical specifications and conformance with codes and standards;
- Quality control as needed to ensure the contractor is providing materials and products consistent with the quantities and quality identified in the design and specifications;
- Certification of pay estimates to be used by the Grantee's financial officer to verify estimated costs for partial payments. The architect or engineer also should obtain evidence that the contractor has made partial payments to any subcontractor or supplier; and
- Compliance monitoring for civil rights, labor and other requirements should be conducted on an ongoing basis by the Grantee. Refer to **Section I Part E, Section IV Part C and Chapter 5, Civil Rights** for additional guidance regarding the specific reporting requirements related to civil rights and labor standards.

Where the project was awarded based on a *fixed price* bid, the contractor should prepare a cost breakdown showing the amount of funding associated with each element of the construction contract. The architect or engineer can use this information for performance monitoring and for determining the accuracy of requests for payments. A copy of this information, which is usually incorporated into the contractor's payment request form, should be included in each of the Grantee's draw requests, in order to facilitate HOME financial review requirements.

13. Make Partial Payments/Withhold Certain Amounts

Partial payments on public contracts generally may be made up to 95 percent of the total amount of compensation of the contract. The remaining five percent is to be held pending the final inspection and acceptance of work. MCA 18-2-316 addresses the limit on retainage for *public construction contracts* administered by the state of Montana or any

department, agency, or political subdivision of the state of Montana. The maximum retainage may not exceed 5% if the contractor is performing by the terms of the contract. The retainage percentage withheld by a government entity from a contractor is also the maximum retainage percentage that a contractor may withhold from a subcontractor. MCA 28-2-2110 addresses the retainage on other than public contracts. The maximum retainage is 10% and applies to the contractor and subcontractor on a project.

14. Conduct Final Inspection

Upon completion of the construction activities, the general contractor must provide the Grantee with a set of "as-built" plans with the request for final payment. Before making the final payment less the five percent to be retained, the Grantee must conduct a final inspection of the construction work.

A written acceptance of work can then be issued and final payment made, less the five percent fee to be retained until project closeout. After 45 days, and upon submission of a **lien release from all contractors and suppliers**, the final five percent of the contract price may be released.

If claims or liens remain against the contract after 45 days, appropriate action must be taken. This includes making payments from the amount retained and/or the performance and payment bonds, as prescribed by state law.

B. SPECIAL CIRCUMSTANCES

Special Conditions also may be incorporated into the contract between the Grantee and the contractor, depending on the specific type of project, including:

- Adoption of a Targeting Plan, which provides for assistance to low and very low (L/VL) income persons within a designated project area;
- Adoption of an Interlocal Agreement between a City and County for a joint HOME project; or
- Adoption of a subgrantee agreement between the Grantee and a private nonprofit corporation (e.g., private non-profit organization), where the subgrantee will own and/or operate the completed facility.

Keep copies of such special conditions to the contract in the HOME project file.

Floodplain Insurance: Structures modified or constructed with HOME funds are subject to federal floodplain insurance requirements. The purchase of federal floodplain insurance is required if a structure assisted in part with HOME funds is constructed within a designated 100-year-floodplain. A publication entitled, *Further Advice on Executive Order 11988, Floodplain Management*, is available from MDOC or can be found on the HUD website at:

C. LABOR STANDARDS

The content of this part applies **specifically** to those Grantees with projects to **rehabilitate or construct 12 or more units of housing**. This part provides an overview of federal and state requirements governing wages and working conditions for laborers and mechanics employed under construction contracts funded in whole or in part with HOME funds. A series of steps that provides a "road map" for successfully complying with the numerous labor standards requirements that exist when Davis-Bacon is triggered is also included in this part.

Grantee Responsibilities

For all HOME-assisted construction projects involving 12 or more units under a single contract, Grantees are required to take the following actions to ensure all requirements related to labor standards are satisfied. **Please note: these actions are *in addition to the requirements discussed in previous sections*.**

1. Designate a Labor Standards Officer

A Labor Standards Officer must be designated by each Grantee before holding the preconstruction conference or beginning of construction. The Labor Standards Officer is responsible for ensuring compliance with the labor standards provisions and serves as a liaison with the contractor, the project engineer, and HOME. This individual must be identified in the Grantee's project Management Plan, as discussed in **Chapter 1, *Program Start-Up***.

2. Include Labor Standards Provisions in Bid Documents

- Include a copy of the current wage rate determinations in the bid solicitation. Your HOME Program Officer can help you obtain the most current wage rate determination available from the U.S. Department of Labor. **Exhibit 4-I1** is a discussion on wage rate determination.
 - **Contact your HOME Program Officer not less than fifteen workdays prior to the bid opening to determine whether the wage rate decisions included in the bid solicitation are still current.** Any modifications to the wage rate determination made less than ten (10) days before bid opening shall be effective unless HOME finds there is not reasonable time available before bid opening to notify all potential bidders of the modification by addendum.
 - Wage determinations have time limitations. If the wage determination approved by HOME is not used for bid solicitation within 180 days of issuance, it is void and a new request for determination must be submitted. If a contract is not awarded within 90 days of the bid opening, or if construction has not begun within 90 days of signing

the contract, any applicable subsequent modifications to the original wage determination must be included in the contract. If this situation arises, please contact your HOME Program Officer for guidance.

- Include the specific bid and contract language and certifications in bid solicitation. Each bidder is required to provide specific certifications assuring the Grantee they will comply with the prescribed labor standards requirements if they are awarded the contract. These special certifications are provided as HUD Form 4010-*Federal Labor Standards Provisions*, **Exhibit 4-J**.

3. Hold a Preconstruction Conference

Following the contract award, the Grantee **must** hold a preconstruction conference. All subcontractors should be included in the discussions to ensure all parties are aware that they also must comply with federal labor standards and civil rights provisions. If the Grantee is utilizing an architect and/or engineer, these individuals should also attend the conference. The Grantee's Labor Standards Officer will cover the federal compliance issues.

- The preconstruction conference represents a key opportunity for giving instructions to the contractor prior to the beginning of project construction. A well-planned and executed conference can help prevent problems and misunderstandings that could delay the project at a later date. The contractor is responsible for the full compliance of all employers (the contractor, subcontractors and any lower-tier subcontractors) with the labor standards provisions applicable to the project.
- HUD has published *A Contractor's Guide to Davis-Bacon* to provide basic information and instructions to contractors concerning Davis-Bacon wage and reporting requirements. The Guide may be downloaded from the following web address:

<http://www.hud.gov/olr/wagereq.pdf>

- **At a minimum**, the preconstruction conference should include discussions of:
 - ✓ Prevailing wage requirements,
 - ✓ Employment of apprentices or trainees,
 - ✓ Frequency of payroll to employees,
 - ✓ Payment of overtime,
 - ✓ Equal employment opportunity regulations,
 - ✓ Employment of minorities and local workers,
 - ✓ Use of minority and local businesses,
 - ✓ Weekly wage reporting requirements,
 - ✓ Notices that must be posted at the job site,

✓ Penalties for failure to comply with labor standards requirements.

- A *Preconstruction Conference Planning Guide* is provided as **Exhibit 4-K1** to assist Grantees in preparing for and conducting the required preconstruction conferences. A checklist of the details to be covered is also included in this exhibit.
- Provide copies of **Exhibit 4-K2** *Preconstruction Conference Planning Guide Supplement – Labor and Civil Rights Requirements* to each contractor representative and subcontractor who attends the preconstruction conference.

4. Document the Preconstruction Conference Discussions

The Grantee is required to record minutes of the conference and file in HOME project file. A verbatim record is not necessary. The names of the persons who attend and a summary of the comments and issues covered are sufficient.

5. Post Notices at the Construction Site

The following notices must be posted at the construction site:

- *Notice to Employees Working on Federal or Federally Financed Construction Projects* Form WH-1321 (**Exhibit 4-L1**), which can be downloaded from <http://www.dol.gov/esa/regs/compliance/posters/pdf/fedprojc.pdf>
- A copy of the wage rate decision. Many wage decisions are multi-paged and cover several counties and/or more than one type of construction. To make this vital information easier to read and understand, grantees can offer a Project Wage Rate Sheet for posting on the job site. This is a one-page listing of only the wage rates applicable to the specific project involved and is much easier for workers to read. Grantee are not required to use the one-page rate sheet, but a sample is given in **Exhibit 4-L2**. **If the one-page sheet is not used, the entire wage rate decision must be posted.**
- Job Safety and Health Protection poster (**Exhibit 4-M**), which can be downloaded from <http://www.osha.gov/Publications/osh3165.pdf>. The text can be downloaded from <http://www.osha.gov/Publications/osh3165text.html>.
- Equal Employment Opportunity poster (**Exhibit 5-B**).

The contractor may post the required notices at the job site on a bulletin board affixed to the side of a temporary field office or storage trailer, or a plywood billboard located near the site of field construction activities. The current wage rates should be placed in a plastic covering and posted with the required notices. Regardless of the method used, it is the contractor's responsibility to provide adequate labor standards requirement notices to construction employees.

6. Obtain Required Contractor Reports

- Payroll Reports must be submitted weekly by both the prime contractor and subcontractor(s); and
- *Notice of Approved Apprenticeship or Trainee Program* must be submitted, if applicable.

Contractors are urged to use the Department of Labor (DOL) Payroll Form WH-347. **Exhibit 4-N1** contains a copy of this form along with instruction for completing it. The text of the "weekly statement with respect to the payment of wages," which is required by regulations of the Secretary of Labor, appears on the reverse side of this form. Contractors may also use and furnish computerized weekly payrolls in lieu of the standard Payroll Form W-347, as long as the basic information contained on both sides of the Form WH-347 is provided.

Exhibit 4-N2 provides *Additional Contractor Payroll Information*. This document provides additional detailed guidance to contractors for the proper completion and use of the above weekly payroll reports.

Contractors may use a numerical code system for reporting job classifications on their payroll form, if the contractor submits a copy of the numerical code system with the initial payroll report, and the codes appear to accurately reflect the actual duties of workers at the job site.

7. Monitor Contractor Performance

The Labor Standards Officer is responsible for monitoring Davis-Bacon construction contracts to ensure that:

- All required notices are posted prominently at the construction site;
- The contractor's weekly payroll reports are accurate and submitted weekly as required; and
- The contractor is complying with applicable labor standards.

This monitoring function can be accomplished through the following activities:

- Conduct **on-site inspections** to ensure that required notices and copies of the applicable wage rates are posted.
- Compare **weekly payroll reports** with the prevailing wage rate decision and review the reports for falsification. The contractor must submit payroll reports within seven days following completion of the workweek for review by the Labor Standards Officer. The Labor Standards Officer should, at a minimum, initial and date each payroll to document the payroll review has been completed. See **Exhibit 4-O**,

Payroll Falsification Indicators for detailed information about how to detect falsification of payroll reports.

- Conduct **interviews with construction employees** to capture observations of the work being performed and to get the worker's views on the hours they work, the type of work they perform and the wages they receive. Interviews should be conducted at least once a month, with a representative of each classification of laborers involved in the construction, and with at least 10 percent of the workforce. In keeping with HUD's efforts to streamline Davis-Bacon requirements, Grantees may request approval from the HOME program to discontinue interviews. Such approval will be granted only if the Grantee documents there to be no problem in weekly payroll reports AND no discrepancies between weekly payroll reports and the on-site interviews. The materials used to conduct construction employee interviews are provided as **Exhibit 4-P** *Record of Employee Interview – Form HUD-11* and *Instruction for Conducting Employee Interviews*.

Labor Standards for Volunteers

"Volunteers" and "sweat equity" are exempted from Davis-Bacon Act requirements on HOME funded projects. Specifically, 24 CFR 92.354 (b) and (c) state that Davis-Bacon wage rates do not apply to:

- Volunteers – an individual who receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered and who is not otherwise employed at any time in the construction work;
- Sweat equity – members of an eligible family who provide labor in exchange for acquisition of a property for homeownership or who provide labor in lieu of, or as a supplement to, rent payments.

Grantees are encouraged by HUD to use and complete a signed *Volunteer Certification Form*. A sample is provided in **Exhibit 4-Q**. Each volunteer worker, other than the contractor's paid employees, should complete some type of volunteer certification when performing work on HOME-funded project activities.

Investigating Labor Standards Violations

Violations of labor standards requirements may surface either as the result of monitoring or through a specific complaint by a construction worker. In either instance, the Grantee is responsible for investigating and documenting the alleged violation.

If a violation is evident, the Labor Standards Officer should first work with the contractor on an informal basis to resolve the problem and allow a reasonable time for correction. When the contractor refuses to address the violation or continues to violate the labor standards provision, immediately notify the HOME Program office in writing concerning the violation. Inform the contractor that an unresolved finding of labor standards violation could result in

debarment, which would make the contractor ineligible for participation in HOME-assisted construction projects in the future.

CHAPTER 4

EXHIBITS

PART I GENERAL PROCUREMENT REQUIREMENTS

- 4-A Procurement Standards
- 4-B Debarment Check Instructions
- 4-C1 Sample Professional Services Contract
- 4-C2 Required Contract Clauses
- 4-C3 Required Contract Supplemental Conditions
- 4-C4 Required Clauses/Conditions Checklist

PART II PROCUREMENT OF SERVICES

- 4-D1 Sample Consulting or Management Services Request for Proposals
- 4-D2 Sample Selection Criteria, Evaluation Forms and Scoring Matrix
- 4-D3 Sample Advertising Availability of a Request for Proposals
- 4-D4 Sample Architectural and Engineering Request for Proposals

PART III CONSTRUCTION BIDDING AND CONTRACTING

- 4-E Architect's Accessibility and Property Standards Certification
- 4-F1 Sample Invitation for Bids
- 4-F2 Sample Advertisement for Bids
- 4-G Sample Transmittal of Contract and Proposed Bid Document
- 4-H Notice of Contract Award and Preconstruction Conference

DAVIS BACON LABOR STANDARDS EXHIBITS

- 4-I1 Requesting Wage Rate Determination Process
- 4-I2 Request for Wage Rate Determination Letter
- 4-I3 Report of Additional Classification and Rate (Form HUD-4230A)
- 4-J Federal Labor Standards Provisions (Form HUD 4010)
- 4-K1 Preconstruction Conference Planning Guide and Checklist
- 4-K2 Preconstruction Conference Planning Guide Supplement – Labor and Civil Rights Requirements
- 4-L1 Notice to Employees Poster (Form WH-1321)
- 4-L2 Project Wage Rate Sheet
- 4-M Job Safety and Health Protection Poster and text (Form OSHA-3165)
- 4-N1 Payroll Report (Form WH-347) and Instructions
- 4-N2 Additional Contractor Payroll Information
- 4-O Payroll Falsification Indicators
- 4-P Record of Employee Interview (Form HUD-11) and Instructions for Conducting Employee Interviews
- 4-Q Volunteer Certification Form